

AMENDED IN SENATE JUNE 28, 2011

AMENDED IN ASSEMBLY MAY 18, 2011

AMENDED IN ASSEMBLY APRIL 7, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 439

Introduced by Assembly Member Skinner

February 14, 2011

An act to amend Section 56.36 of the Civil Code, relating to health care information.

LEGISLATIVE COUNSEL'S DIGEST

AB 439, as amended, Skinner. Health care information.

Existing law, the Confidentiality of Medical Information Act (CMIA), prohibits a health care provider, a contractor, or a health care service plan from disclosing medical information, as defined, regarding a patient of the provider or an enrollee or subscriber of the health care service plan without first obtaining an authorization, except as specified. In addition to other remedies available, existing law authorizes an individual to bring an action against any person or entity who has negligently released his or her confidential records in violation of those provisions for nominal damages of \$1,000.

This bill would specify that, in an action brought on or after January 1, 2012, a court may not award nominal damages if the defendant establishes specified factors as an affirmative defense, including, but not limited to, that it is a covered entity, as defined, and has complied with any obligations to notify persons entitled to receive notice regarding the release of the information. The bill would also make a technical, nonsubstantive change.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 56.36 of the Civil Code is amended to
2 read:
3 56.36. (a) Any violation of the provisions of this part that
4 results in economic loss or personal injury to a patient is punishable
5 as a misdemeanor.
6 (b) In addition to any other remedies available at law, any
7 individual may bring an action against any person or entity who
8 has negligently released confidential information or records
9 concerning him or her in violation of this part, for either or both
10 of the following:
11 (1) Except as provided in subdivision (e), nominal damages of
12 one thousand dollars (\$1,000). In order to recover under this
13 paragraph, it shall not be necessary that the plaintiff suffered or
14 was threatened with actual damages.
15 (2) The amount of actual damages, if any, sustained by the
16 patient.
17 (c) (1) In addition, any person or entity that negligently
18 discloses medical information in violation of the provisions of this
19 part shall also be liable, irrespective of the amount of damages
20 suffered by the patient as a result of that violation, for an
21 administrative fine or civil penalty not to exceed two thousand
22 five hundred dollars (\$2,500) per violation.
23 (2) (A) Any person or entity, other than a licensed health care
24 professional, who knowingly and willfully obtains, discloses, or
25 uses medical information in violation of this part shall be liable
26 for an administrative fine or civil penalty not to exceed twenty-five
27 thousand dollars (\$25,000) per violation.
28 (B) Any licensed health care professional, who knowingly and
29 willfully obtains, discloses, or uses medical information in violation
30 of this part shall be liable on a first violation, for an administrative
31 fine or civil penalty not to exceed two thousand five hundred
32 dollars (\$2,500) per violation, or on a second violation for an
33 administrative fine or civil penalty not to exceed ten thousand
34 dollars (\$10,000) per violation, or on a third and subsequent
35 violation for an administrative fine or civil penalty not to exceed

1 twenty-five thousand dollars (\$25,000) per violation. Nothing in
2 this subdivision shall be construed to limit the liability of a health
3 care service plan, a contractor, or a provider of health care that is
4 not a licensed health care professional for any violation of this
5 part.

6 (3) (A) Any person or entity, other than a licensed health care
7 professional, who knowingly or willfully obtains or uses medical
8 information in violation of this part for the purpose of financial
9 gain shall be liable for an administrative fine or civil penalty not
10 to exceed two hundred fifty thousand dollars (\$250,000) per
11 violation and shall also be subject to disgorgement of any proceeds
12 or other consideration obtained as a result of the violation.

13 (B) Any licensed health care professional, who knowingly and
14 willfully obtains, discloses, or uses medical information in violation
15 of this part for financial gain shall be liable on a first violation, for
16 an administrative fine or civil penalty not to exceed five thousand
17 dollars (\$5,000) per violation, or on a second violation for an
18 administrative fine or civil penalty not to exceed twenty-five
19 thousand dollars (\$25,000) per violation, or on a third and
20 subsequent violation for an administrative fine or civil penalty not
21 to exceed two hundred fifty thousand dollars (\$250,000) per
22 violation and shall also be subject to disgorgement of any proceeds
23 or other consideration obtained as a result of the violation. Nothing
24 in this subdivision shall be construed to limit the liability of a
25 health care service plan, a contractor, or a provider of health care
26 that is not a licensed health care professional for any violation of
27 this part.

28 (4) Nothing in this subdivision shall be construed as authorizing
29 an administrative fine or civil penalty under both paragraphs (2)
30 and (3) for the same violation.

31 (5) Any person or entity who is not permitted to receive medical
32 information pursuant to this part and who knowingly and willfully
33 obtains, discloses, or uses medical information without written
34 authorization from the patient shall be liable for a civil penalty not
35 to exceed two hundred fifty thousand dollars (\$250,000) per
36 violation.

37 (d) In assessing the amount of an administrative fine or civil
38 penalty pursuant to subdivision (c), the Office of Health
39 Information Integrity, licensing agency, or certifying board or
40 court shall consider any one or more of the relevant circumstances

1 presented by any of the parties to the case including, but not limited
2 to, the following:

3 (1) Whether the defendant has made a reasonable, good faith
4 attempt to comply with this part.

5 (2) The nature and seriousness of the misconduct.

6 (3) The harm to the patient, enrollee, or subscriber.

7 (4) The number of violations.

8 (5) The persistence of the misconduct.

9 (6) The length of time over which the misconduct occurred.

10 (7) The willfulness of the defendant's misconduct.

11 (8) The defendant's assets, liabilities, and net worth.

12 (e) (1) In an action brought by an individual pursuant to
13 subdivision (b) on or after January 1, 2012, the court shall award
14 any actual damages and reasonable attorney's fees and costs, but
15 may not award nominal damages, for a violation of this part if the
16 defendant establishes all of the following as an affirmative defense:

17 (A) The defendant is a covered entity, as defined in Section
18 160.103 of Title 45 of the Code of Federal Regulations.

19 (B) The defendant has complied with any obligations to notify
20 all persons entitled to receive notice regarding the release of the
21 information or records.

22 (C) The release of confidential information or records was solely
23 to another covered entity.

24 (D) The defendant took appropriate preventive actions to protect
25 the confidential information or records against release, retention,
26 or use by any person or entity other than the covered entity that
27 received the information or records, including, but not limited to:

28 (i) Developing and implementing security policies and
29 procedures.

30 (ii) Designating a security official who is responsible for
31 developing and implementing its security policies and procedures,
32 including educating and training the workforce.

33 (iii) Encrypting the information or records, and protecting
34 against the release or use of the encryption key and passwords, *or*
35 *transmitting the information or records in a manner designed to*
36 *provide similar protections against improper disclosures.*

37 (E) The defendant took appropriate corrective action after the
38 release of the confidential records or information, and the covered
39 entity that received the information or records immediately
40 destroyed or returned the information or records.

1 (F) The covered entity that received the confidential information
2 or records did not retain, use, or release the information or records.

3 (G) The defendant has not ~~previously violated this part, or, in~~
4 ~~the court's discretion, despite the prior violation, been found liable~~
5 *for a violation of this part within the three years preceding the*
6 *alleged violation, or the court determines that* application of the
7 affirmative defense is found to be compelling and consistent with
8 the purposes of this section to promote reasonable conduct in light
9 of all the facts.

10 (2) In an action under this subdivision, a plaintiff shall be
11 entitled to recover reasonable attorney's fees and costs without
12 regard to an award of actual or nominal damages.

13 (3) A defendant shall not be liable for more than one judgment
14 on the merits for a violation of this subdivision.

15 (f) (1) The civil penalty pursuant to subdivision (c) shall be
16 assessed and recovered in a civil action brought in the name of the
17 people of the State of California in any court of competent
18 jurisdiction by any of the following:

19 (A) The Attorney General.

20 (B) Any district attorney.

21 (C) Any county counsel authorized by agreement with the
22 district attorney in actions involving violation of a county
23 ordinance.

24 (D) Any city attorney of a city.

25 (E) Any city attorney of a city and county having a population
26 in excess of 750,000, with the consent of the district attorney.

27 (F) A city prosecutor in any city having a full-time city
28 prosecutor or, with the consent of the district attorney, by a city
29 attorney in any city and county.

30 (G) The Director of the Office of Health Information Integrity
31 may recommend that any person described in subparagraphs (A)
32 to (F), inclusive, bring a civil action under this section.

33 (2) If the action is brought by the Attorney General, one-half
34 of the penalty collected shall be paid to the treasurer of the county
35 in which the judgment was entered, and one-half to the General
36 Fund. If the action is brought by a district attorney or county
37 counsel, the penalty collected shall be paid to the treasurer of the
38 county in which the judgment was entered. Except as provided in
39 paragraph (3), if the action is brought by a city attorney or city
40 prosecutor, one-half of the penalty collected shall be paid to the

1 treasurer of the city in which the judgment was entered and one-half
2 to the treasurer of the county in which the judgment was entered.

3 (3) If the action is brought by a city attorney of a city and
4 county, the entire amount of the penalty collected shall be paid to
5 the treasurer of the city and county in which the judgment was
6 entered.

7 (4) Nothing in this section shall be construed as authorizing
8 both an administrative fine and civil penalty for the same violation.

9 (5) Imposition of a fine or penalty provided for in this section
10 shall not preclude imposition of any other sanctions or remedies
11 authorized by law.

12 (6) Administrative fines or penalties issued pursuant to Section
13 1280.15 of the Health and Safety Code shall offset any other
14 administrative fine or civil penalty imposed under this section for
15 the same violation.

16 (g) For purposes of this section, “knowing” and “willful” shall
17 have the same meanings as in Section 7 of the Penal Code.

18 (h) No person who discloses protected medical information in
19 accordance with the provisions of this part shall be subject to the
20 penalty provisions of this part.